

1 James Alan Bush
2 471 East Julian Street
3 San Jose, California 95112
4 (408) 791-4866

5 Plaintiff in pro per
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FILED

DEC - 6 2011

8 RICHARD W. WIEKING
9 CLERK, U.S. DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND
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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**
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18 James Alan Bush,
19 Plaintiff,
20 v.
21 Sunnyvale Department of
22 Public Safety, et al.,
23 Defendants.

Case No. C 08-01354 PJH
MOTION FOR LEAVE TO APPEAL
IN FORMA PAUPERIS
[Fed. R. App. P. 24 (b)]

Judge Phyllis J. Hamilton

24 **RELIEF SOUGHT**

25 Plaintiff, James Alan Bush, moves the Court for an order permitting
26 him to prosecute an appeal from the judgment entered by this Court on
27 November 4th, 2011, in forma pauperis.

28 **GROUND FOR MOTION**

29 1. This motion is authorized by the provisions of Section 1915 of
30 Title 28 of the United States Code, and by Rule 24 of the Federal
31 Rules of Appellate Procedure.
32
33 2. The required Affidavit of James Alan Bush, which is attached in

1 support of this motion, shows that plaintiff is "a person unable to
2 pay...fees or give security therefor" within the meaning of Section
3 1915(a)(1) of Title 28.

4 3. Plaintiff desires to assert on appeal that the decision to dismiss
5 this case was erroneous in that the Court failed to notice plaintiff
6 of an order with which he purportedly failed to comply, specifically,
7 the order setting a deadline to file proof of service of summons
8 to the defendants. Plaintiff will prove that, due to a clerical
9 error, this order was never delivered to him because the Court
10 failed to properly address its correspondence [see Docket No. 138],
11 even though the plaintiff notified the Clerk by letter of his new
12 address two months prior and also had filed several documents with
13 the Court using his current address, and that the Court itself used
14 his current address on several previous and subsequent occasions.
15 Plaintiff will argue that, because this clerical error was no
16 fault of his own, additional time should be granted to comply with
17 the order, and that the dismissal should be set aside pursuant to
18 Rule 60(b)(5) of the Federal Rules of Civil Procedure, which permits
19 a court to relieve a party from an otherwise final judgment "when
20 it is no longer equitable that the judgment should continue to have
21 prospective application."

22 4. The assertion of errors described above constitute arguable
23 assertions of law, and are in fact supported by various authorities,
24 including:

25 a. that the Court failed to comply with Code Civ. Proc. §
26 1013(a), which governs service by mail, and which requires the
27 order served to be "addressed to the person on whom it is to

1 be served, at the address as last given by that person on any
2 document filed in the cause and served on the party making
3 service by mail..." [Code Civ. Proc. § 1013(a)];

4 b. that several courts have held that section 1013, subdivision (a)
5 is applicable to this Court [Lee v. Placer Title Co. (1994)
6 28 Cal.App.4th 503, 510 (Lee) (because notice "was not sent to
7 the 'address as last given by [litigant] on any document filed
8 in the cause,' as required by section 1013, subdivision (a),
9 the notice was not effective" and the dismissal subsequently
10 entered was void); Triumph Precision Products, Inc. v. Insurance
11 Co. of North America (1979) 91 Cal.App.3d 362, 365 (Triumph)
12 (section 1013, subdivision (a) "is applicable to the mailing by
13 a court clerk of notice announcing the entry of an appealable
14 judgment or order");
15 c. that service by mail "requires strict compliance with all
16 statutory requirements" [Lee, *supra*, 28 Cal.App.4th at p. 509];
17 and,
18 d. that where a notice is improperly addressed, "it is as though
19 notice were never mailed by the clerk" [Triumph, *supra*, 91 Cal.
20 App.3d at p. 365].

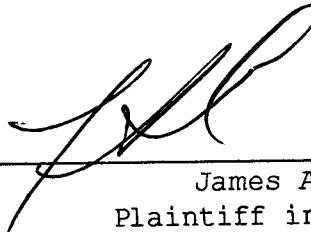
21 5. In seeking to proceed in forma pauperis, plaintiff is not required
22 to establish that he will actually prevail on appeal, but only that
23 he desires to assert arguments on appeal that are not "frivolous"
24 [see, e.g., Free v. United States, 879 F.2d 1535, 1536 (7th Cir. 1989)].
25 An appeal is not "frivolous" within the meaning of Section 1915 when
26 it asserts any contention that is, conceivably, arguable [see, e.g.,
27 Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir.

1 1998)]. As noted in Paragraph 4 of this motion, there is authority
2 that supports the arguments that plaintiff desires to assert on
3 appeal.

4 For all of the reasons stated in this motion, plaintiff respectfully
5 requests that this motion be granted.

6 Dated: December 5th, 2011

7 By: X


James Alan Bush
Plaintiff in pro per

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Form 4.

Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Appellant or Petitioner, James Alan Bush

v.

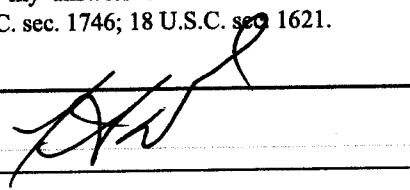
Case No. C 08-01354 PJH

Appellee or Respondent, Snyvl. Dept. of Pub. Safety, et al.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. 28 U.S.C. sec. 1746; 18 U.S.C. sec. 1621.

Signed:



Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: December 5th, 2011

My issues on appeal are:

This case was erroneously dismissed in that the Court failed to notice plaintiff of an order with which he purportedly failed to comply, specifically, the order setting a deadline to file proof of service of summons to the defendants. Plaintiff will prove that, due to a clerical error, this order was never delivered to him because the Court failed to properly address its correspondence [see Docket No. 138], even though the plaintiff notified the Clerk by letter of his new address two months prior and also had filed several documents with the Court using his current address, and that the Court itself used his current address on several previous and subsequent occasions. Plaintiff will argue that, because this clerical error was no fault of his own, additional time should be granted to comply with the order, and that the dismissal should be set aside pursuant to Rule 60(b)(5) of the Federal Rules of Civil Procedure, which permits a court to relieve a party from an otherwise final judgment "when it is no longer equitable that the judgment should continue to have prospective application."

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income Source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ 0	\$ 0	\$ 0	\$ 0
Self-Employment	\$ 0	\$ 0	\$ 0	\$ 0
Income from real property (such as rental income)	\$ 0	\$ 0	\$ 0	\$ 0
Interest and Dividends	\$ 0	\$ 0	\$ 0	\$ 0
Gifts	\$ 0	\$ 0	\$ 0	\$ 0
Alimony	\$ 0	\$ 0	\$ 0	\$ 0
Child Support	\$ 0	\$ 0	\$ 0	\$ 0
Retirement (such as social security, pensions, annuities, insurance)	\$ 0	\$ 0	\$ 0	\$ 0
Disability (such as social security, insurance payments)	\$ 0	\$ 0	\$ 0	\$ 0
Unemployment Payments	\$ 0	\$ 0	\$ 0	\$ 0
Public-Assistance (such as welfare)	\$ 360	\$ 0	\$ 360	\$ 0
Other (specify) <i>n/a</i>	\$ 0	\$ 0	\$ 0	\$ 0
TOTAL MONTHLY INCOME:	\$ 360	\$ 0	\$ 360	\$ 0

2. List your employment history, most recent employer first.
(Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
Cloudmark, Inc.	128 King Street, 2nd Floor San Francisco, California 94107	From <input type="text" value="August 2004"/> To <input type="text" value="July 2005"/>	\$ <input type="text" value="8,000"/>
DigitalPersona, Inc.	720 Bay Road Redwood City, California 94063	From <input type="text" value="January 2000"/> To <input type="text" value="April 2004"/>	\$ <input type="text" value="8,000"/>
Harris Broadcast Automation Solutions	1134 East Arques Avenue Sunnyvale, California 94085	From <input type="text" value="October 1998"/> To <input type="text" value="December 1999"/>	\$ <input type="text" value="7,500"/>
International Consulting Group, Inc.	2021 The Alameda, Suite 220 San Jose, California 95126	From <input type="text" value="June 1998"/> To <input type="text" value="September 1998"/>	\$ <input type="text" value="3,750"/>

3. List your spouse's employment history, most recent employer first.
(Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross Monthly Pay
-	-	From <input type="text" value="-"/> To <input type="text" value="-"/>	\$ <input type="text" value="0"/>
-	-	From <input type="text" value="-"/> To <input type="text" value="-"/>	\$ <input type="text" value="0"/>
-	-	From <input type="text" value="-"/> To <input type="text" value="-"/>	\$ <input type="text" value="0"/>
-	-	From <input type="text" value="-"/> To <input type="text" value="-"/>	\$ <input type="text" value="0"/>

4. How much cash do you and your spouse have? \$ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount You Have	Amount Your Spouse Has
-	-	\$ 0	\$ 0
-	-	\$ 0	\$ 0
-	-	\$ 0	\$ 0
-	-	\$ 0	\$ 0

If you are a prisoner, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishing.

Home	Value	Other Real Estate	Value
n/a	\$ 0	n/a	\$ 0

Motor Vehicle 1: Make & Year	Model	Registration #	Value
n/a	n/a	-	\$ 0
Motor Vehicle 2: Make & Year	Model	Registration #	Value
n/a	n/a	-	\$ 0

Other Assets	Value
n/a	\$ 0
n/a	\$ 0
n/a	\$ 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse	Amount owed to you	Amount owed to your spouse
n/a	\$ 0	\$ 0
n/a	\$ 0	\$ 0
n/a	\$ 0	\$ 0

7. State the persons who rely on you or your spouse for support. If a dependent is a minor, list only the initials and not the full name.

Name	Relationship	Age
n/a	-	0
n/a	-	0
n/a	-	0

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ 400	\$ 0
- Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
- Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ 0	\$ 0
Home maintenance (repairs and upkeep)	\$ 0	\$ 0
Food	\$ 200	\$ 0
Clothing	\$ 0	\$ 0
Laundry and dry-cleaning	\$ 50	\$ 0
Medical and dental expenses	\$ 30	\$ 0
Transportation (not including motor vehicle payments)	\$ 25	\$ 0
Recreation, entertainment, newspapers, magazines, etc.	\$ 0	\$ 0
Insurance (not deducted from wages or included in mortgage payments)		
- Homeowner's or renter's.....	\$ 0	\$ 0
- Life.....	\$ 0	\$ 0
- Health.....	\$ 0	\$ 0
- Motor Vehicle.....	\$ 0	\$ 0
- Other: n/a	\$ 0	\$ 0
Taxes (not deducted from wages or included in mortgage payments)		
Specify: n/a	\$ 0	\$ 0
Installment payments		
- Motor Vehicle.....	\$ 0	\$ 0
- Credit Card (name): n/a	\$ 0	\$ 0
- Department Store (name): n/a	\$ 0	\$ 0
- Motor Vehicle.....	\$ 0	\$ 0

Alimony, maintenance, and support paid to others	\$ <input type="text" value="0"/>	\$ <input type="text" value="0"/>
Regular expenses for the operation of business, profession, or farm (attach detailed statement)	\$ <input type="text" value="0"/>	\$ <input type="text" value="0"/>
Other (specify) <input type="text" value="n/a"/>	\$ <input type="text" value="0"/>	\$ <input type="text" value="0"/>
Total Monthly Expenses:	\$ <input type="text" value="705"/>	\$ <input type="text" value="0"/>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No

If yes, describe on an attached sheet.

10. Have you paid--or will you be paying--an attorney any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? \$

If yes, state the attorney's name, address, and telephone number.

Name

Address

City

State

Zip Code

Telephone Number (ex., 4153558000)

11. Have you paid--or will you be paying--anyone other than attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? \$

If yes, state the attorney's name, address, and telephone number.

Name

Address

City

State

Zip Code

Telephone Number (ex., 4153558000)

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

I was recently released from an in-custody stay of nearly three years. I have no cash and no assets, and am relying on public assistance to pay basic living expenses.

13. State the city and state of your legal residence.

City

State

Your daytime telephone number (ex., 4153558000)

Your age:

Your years of schooling:

Last four digits of your Social Security Number (ex.,6789)